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IN THE

Supreme Court of the United States

October Term, 1991

JOHN K. YEE and IRENE YEE, *et al.*,

Petitioners,

v.

CITY OF ESCONDIDO,

Respondent.

ON WRIT OF CERTIORARI
TO THE FOURTH APPELLATE DISTRICT, DIVISION ONE,
COURT OF APPEAL FOR THE STATE OF CALIFORNIA

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

INTRODUCTION

Petitioners' opening brief demonstrated that: (1) the City of Escondido has taken Petitioners' property by physical occupation or, in the alternative, under the criteria laid down in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), by an oppressive deprivation of protected property rights; (2) the transfer of Petitioners' property rights to their tenants does not advance any legitimate governmental interest; and (3) Escondido's Ordinance deprives Petitioners of their property without due process of law. Escondido has rebutted none of this.

More importantly, the City has no good answer for the basic question: what do people buy when they pay a $20,000 or $30,000 premium for a used mobilehome in an Escondido

mobilehome park? According to the City, they buy "the protection [of] the Ordinance." Brief for Respondent at 24. In other words, they buy the rights created by the Ordinance.[1] As Petitioners' brief showed, the rights the Ordinance transferred are: (1) the right to occupy the property in perpetuity; (2) the right to pay a rent below market rent in perpetuity; (3) the right to select the next tenant to occupy the property; (4) the right to effectively set and collect a portion of the next tenant's rent by charging a premium on the sale of the mobilehome coach; and (5) the right to sell, bequeath, or let pass by intestacy all of these rights. The "protection of the Ordinance" is Respondent's euphemism for leasehold interests that the City has carved out of Petitioners' property and awarded to the tenants. That is what the incoming tenant pays a premium for. The City's euphemism cannot disguise an uncompensated taking. Brief for Respondent at 24.

The City attempts to divert attention from the legal inadequacies of its position by relying on pages of factual allegations. These are irrelevant since the City asks the Court to affirm a dismissal on the pleadings. Few of these assertions are germane to the constitutional issues before the Court. Most are outside the record. All can be refuted at trial. Petitioners briefly address only some of the more egregious assertions.

History of Operating Losses in the Yees' Parks

Escondido asserts there is no taking because Petitioners receive reasonable rents. Rents have little relevance in taking cases (except as an indication of value in assessing

[1]Leaseholds cannot be taken without just compensation. *Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295 (1976); *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949).

damages), and the Yees are not, in any event, predators but ordinary business people whose controlled revenues are insufficient to pay their property's expenses.[2] None of the litany of alleged abuses has any bearing on the constitutional issue: does Escondido's Ordinance appropriate interests in the Petitioners' property? Abusive practices can be and are regulated through other laws that do not appropriate interests in the realty.

The Mobilehome Rental Market in Escondido Is Not a Monopoly.

"Monopoly," "monopoly rents," and "monopoly power" echo through the City's Brief like a refrain as the justification for Escondido's Ordinance, but Escondido's twenty-nine mobilehome parks (let alone California's 5,800 mobilehome parks)[3] are no monopoly. Economists define monopoly as a single supplier, such as an electric utility, of a product or service for which there is no ready substitute. PAUL A. SAMUELSON, ECONOMICS (13th ed. 1989). Where people can choose from dozens of mobilehome parks, buy or rent a house or condominium, or rent an apartment, there is no monopoly; and no park owner can exercise monopoly power by restricting

[2]*See* Administrative Record in *Yee v. Mobilehome Park Rental Review Board*, No. N-51754 (San Diego Super. Ct. filed June 13, 1991). The Yees are experiencing an annual net operating loss (excluding depreciation of $291,000) of approximately $84,000 *with* the rent increase allowed by Escondido's rent board. (A.R. 325, 345). That rents increased in the 1970s and the 1980s proves nothing. At the same time housing prices were soaring eight-fold from $23,000 to $200,000 median price (San Diego Economic Bulletin, Vol. 39, No. 11, November 1991), and rent increases under the circumstances were entirely predictable. When property is taken, just compensation must be paid, whether the owner's remaining property is profitable, breaks even, or loses money.

[3]Brief for Respondent at 5, n.7.

supplies in order to increase prices. *See Azul Pacifico v. City of Los Angeles*, 948 F.2d 575, 582 (9th Cir. 1991) (rejecting similar arguments). When demand temporarily outruns supply, rents will rise and attract new investment, (but for "slow growth" policies or local rent controls that deter development) and new development will tend to depress rents toward equilibrium levels. What the City labels "monopoly" is just the normal interplay of supply and demand in a competitive market. Since the Constitution protects all property — even that of "monopolists" — Petitioners doubt the constitutional significance of these issues, but market conditions are issues of fact. If they matter as much as the City suggests, let them be proved or disproved at trial.

The Purchase Price Paid For a Coach is a Questionable Investment and Its Remaining Value is a Factual Issue

The City claims that vacancy controls protect the residents' "investment."[4] Nowhere do they attempt to separate the value of the coach itself (which is depreciable personal property, worth only its Blue Book value)[5] from the premium paid for the "protection" of the Ordinance (*i.e.*, for the bargain leasehold it creates). At trial, Petitioners will establish that

[4]The City argues that rent increases can be substituted for vacancy decontrol. The Complaint states that premiums are approximately $40,000, requiring $400 per month rent increases. The City to date has granted rent increases of $4 to $27.50 to park owners. *Westwinds Mobile Home Park v. Mobilehome Park Rental Review Board*, No. N-54104 (San Diego Super. Ct. December 24, 1991); *Yee v. Mobilehome Park Rental Review Board, supra*.

[5]Coaches are typically financed and secured as personal property under California Commercial Code §§ 9102, 9202(3)(b),(4) and California Vehicle Code §§ 6301-6302.

under rent control the residents' "investment" consists of the value of the coach, which depreciates rapidly, and the value of the interests appropriated by the Ordinance. In other words, the City would protect the appropriated "investment" in the park owner's property. In *Azul Pacifico, supra*, Mrs. Morrison paid $77,000 for an absolutely worthless coach. 948 F.2d at 578. To protect the tenant's "investment" in a worthless coach, the Ordinance in *Azul Pacifico* had the effect of transferring a $77,000 estate in the land to the tenant.[6]

Seeking Rent Increases at Time of Sale is Not a Realistic Alternative

The City then argues that owners may "seek rent increases at the time of a mobilehome's sale." Brief for Respondent at 40. The City would have the Court believe that whenever a resident lists his coach for sale, the owner need only apply to the Mobilehome Rent Review Board (the same City Council that filed criminal charges against most of these Petitioners weeks after this Court granted *certiorari*) for an appropriate increase.[7] It taxes credulity to suggest that after

[6]The average coach cost $21,800 in 1985. The Kelley Blue Book shows a 50% decline in value in ten years from the first number quoted (which is less than a new price). Kelley Blue Book, Mobilehome Guide, 1980-82. Ninety-six percent of California coaches are at least ten years old and 60% are twenty to thirty years old and practically worthless on resale. Hirsch & Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*,35 UCLA L. REV. 399, 402 n.6, 463 (1988).

[7]The charges involve rent increases at resale under long term leases that Petitioners believe to be exempt from local rent controls. *People v. Charles E. Dupont*, San Diego Municipal Court No. E031733 (filed Nov. 27, 1991); *People v. Olen Mercer*, San Diego Municipal Court No. E031734 (filed Nov. 27, 1991); *People v. George Mekjian*, San Diego Municipal Court No. E031735 (filed Nov. 27, 1991); *People v. Richard C. Keubler*, San Diego Municipal Court No. E031736 (filed Nov. 27, 1991); *People v. John Yee*, San Diego Municipal Court No. E031738 (filed Nov. 27, 1991).

three years of litigation in six courts, the City would now allow significant increases at resale.[8]

I. THE ESCONDIDO ORDINANCE HAS TAKEN PETITIONERS' PROPERTY BY PHYSICAL OCCUPATION

"You can dramatically increase the value of your homes."[9]

Mobilehome rent control advocates recognized that the passage of the Ordinance (not the continued existence of the State Mobilehome Park Residency Law) was the critical event which created the valuable, tranferable estate, and for good reason: The Ordinance not only guarantees below market rent but precludes the park owner from terminating tenancies or refusing to renew tenancies with existing tenants and refusing to grant tenancies to prospective purchasers. (Ordinance Section 6, Ordinance No. 88-50, Section 2). This constitutes "required acquiescence [which] is at the heart of the concept of occupation." *FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987).

The local Ordinance has to be considered in tandem with State law. The *Pinewood Estates v. Barnegat Township Leveling Bd.*, 898 F.2d 347 (3d Cir. 1990) and *Azul Pacifico* Courts of Appeal are in accord, and as the district court said in *Azul Pacifico*, to do otherwise would create a constitutional loophole

[8]In practice, after rolling rents back two and a half years, Escondido's rent board has allowed increases of as little as $4 per space per month, *Westwinds Mobile Home Park v. Mobilehome Park Rental Review Board, City of Escondido*, No. N-54104 (San Diego Super. Ct. filed Dec. 24, 1991); *Carefree Ranch, Ltd. v. Mobilehome Park Rental Review Board, City of Escondido, appeal docketed*, 4th Dist. Civil No. DO14142 (Cal. Ct. App. March 26, 1991). At $4 per space per month, an owner would recover the application fee in sixteen years.

[9]Election handbills for Proposition K.

where different levels of government cooperating with each other could achieve an unconstitutional result without liability. *Azul Pacifico v. City of Los Angeles*, 740 F. Supp. 772, 776 (1990), *aff'd in pertinent part*, 948 F.2d 575 (9th Cir. 1991). Passage of the Escondido Ordinance was the critical element in the taking.[10]

Escondido's attempted reliance on *Florida Power* collides with the Court's express refusal there to reach the issue at hand in the case — the situation where a lessor who has voluntarily invited one tenant onto his property is required "to enter into, renew, or refrain from terminating" the tenancy. *Florida Power*, 480 U.S. 245, 252 n.6. Petitioners invited their initial tenants onto the property, but it is by governmental fiat, not by voluntary choice, that they must allow in successor tenants, who have bought the right to such tenancies from prior tenants with hard cash. The City apparently concedes that an Ordinance requiring owners to continue to make their property available for rental use once they begin to do so may be a physical occupation. Brief of Respondent at 28 (citing *Florida Power*).

Further, the Ordinance effects a transfer of appreciation in the land from the park owner to the tenant, where the tenant is free to immediately realize its value by way of sale and defeats the purpose of rent control: preserving low and moderate income housing opportunities.[11] (This is unlike a

[10]*See Fresh Pond Shopping Ctr., Inc. v. Callahan*, 464 U.S. 875, 878 (1983) (Rehnquist, J., dissenting).

[11]While the City erroneously contends that "all Petitioners have lost is their ability to extract excessive rents from their homeowner tenants" (Brief for Respondent at 17), they studiously avoid the fact that the Ordinance allows departing tenants to extract "excessive rents" — presumably market rents — from incoming tenants. The City's citations to *Eamiello v. Liberty Mobilehome Sales, Inc.*, 208 Conn. 620, 546 A.2d 805 (1988), *appeal dismissed*, 489 U.S. 1002 (1989); and *Thompson v.*

(cont'd)

typical rent regulation which, by merely regulating the rents for existing tenants, simply diminishes the value of the property in question and thus serves the purpose of preserving low and moderate income housing opportunities.) The value of the underlying real property remains the same, but the Escondido Ordinance effects an outright transfer of a part of the property to the selling tenant. This transfer (rather than mere diminution in value) implicates the power of eminent domain and compels just compensation.[12] "This linchpin . . . is the principle that an exercise of eminent domain always invokes a *transfer* of property." William B. Stoebuck, *Police Power, Takings, and Due Process, et al.*, 37 WASH. L. REV., 1056, 1084 (1980).

Escondido resorts to an arid legal formalism, arguing that there is no established "state-recognized property interest" corresponding to that which has been taken from Petitioners and given to incumbent tenants. A property interest compensable under the Takings Clause is "that value which is capable of transfer from owner to owner and thus of exchange for some equivalent." *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949).

The right to control occupancy, *i.e.*, the right to exclude, is protected under the Fifth Amendment. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). In addition, since an asset's earnings are "incidents of ownership," just as the asset

Merlino Enterprises, Inc., 208 Conn. 656, 545 A.2d 1094 (1988)(per curiam), *appeal dismissed*, 488 U.S. 1024 (1989) are inapposite. These were not rent control cases. 208 Conn. at 649, 546 A.2d at 820. A marketable estate in land had not been created on behalf of the tenants. Rather, the landlord at any time was free to capture any placement value by raising rents without restriction. A Fifth Amendment violation did not take place because the park owner was free to obtain just compensation through the normal operation of the market.

[12]Here, the rights taken from the owner have not disappeared (like Penn Central's right to build an office tower).

itself is property, the right to collect rents, which is transferred by the statute from landlord to tenant, enjoys constitutional protection. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980).[13]

The *Hall* trial court (after remand from the Court of Appeals), held that Mrs. Hall could have sold the same right to occupy at a reduced rate and the tenant would enjoy the added security of permanence of that right. *Hall v. City of Santa Barbara*, No. 85-5838, Memorandum of Decision at 15 (C.D. Cal. filed June 18, 1989).

The forced occupancy described above,[14] as well as the uncompensated transfer of an interest in title, constitutes a *per se* taking.[15]

The City would have the Court believe that the Petitioners, or their successors, can readily convert their mobilehome parks to other uses. If this were true, it would avail the City nothing, for the Court rejected the same argument in *Loretto*

[13]The interest transferred by the Ordinance under California law is an estate in real property, defined by Cal. Civ. Code § 14 to be coextensive with "lands, tenements and hereditaments." Hereditaments include lands, tenements and all interests which would pass to heirs, and includes incorporeal hereditaments such as rents. *Callahan v. Martin*, 3 Cal. 2d 110, 43 P.2d 788 (1935).

[14]Assuming the industry average of 11% move-outs per year (Hirsch & Hirsch, *supra*, at 418 n.58), approximately 40% of present tenants in Petitioners' parks are there without invitation and as a result of compulsion.

[15]While not determinative, *Block v. Hirsch*, 256 U.S. 135 (1921), *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922) and *Bowles v. Willingham*, 321 U.S. 503 (1944) involved the application of temporary rent controls, enacted in wartime or its aftermath, that did not compel owners to offer accommodations for rent, or to accept incoming tenants. As Justice Rehnquist noted in his dissent in *Fresh Pond Shopping Ctr., Inc. v. Callahan*, 464 U.S. 875, 878 (1983): "[T]he very fact that there is no foreseeable end to the emergency takes this case outside the Court's holding in *Block v. Hirsch*. We reserved judgment as to whether such a regulatory scheme would be constitutional if it were made part of a permanent scheme."

v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 439 n.17 (1982):

> [T]he landlord could avoid the requirements of [the New York cable television law] by ceasing to rent the building to tenants. But a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation . . . .[16]

II. THE REGULATORY TAKINGS CLAIM IS RIPE AND MERITORIOUS

The regulatory takings claim is advanced under two rubrics: that the Ordinance does not substantially advance a legitimate governmental interest (*Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987)), and the *Penn Central* ad hoc analysis. Escondido oversimplifies takings analysis, as if it were simply a choice between two categories of virtual *per se* cases. Governmental measures are either literal physical occupations and *per se* takings under *Loretto;* or they cannot be takings unless they deprive property of substantially all useful value (the first prong of *Agins v. City of Tiburon*, 447 U.S. 255 (1980)), or impose confiscatory returns. There is, according

[16]In reality, conversion presents a kind of gauntlet. State law requires notices to residents and preparation of an impact report. Cal. Civ. Code § 798.56(f), Cal. Gov't Code §§ 65863.7, 66427. Local governments may, and often do, condition approvals upon payment of relocation benefits, or even purchase of used mobilehome coaches at "in-place value" (*i.e.*, including the leasehold interests created by rent control). Depending upon the new use proposed and applicable zoning, conversion may require preparation and certification of an environmental impact report under the California Environmental Quality Act (Cal. Pub. Res. Code § 21000 *et seq.*); a change in zoning (Cal. Gov't Code § 65853 *et seq.*); amendments to the local general plan (Cal. Gov't Code §§ 65358, 65860); and approval of a subdivision may under the Subdivision Map Act (Cal. Gov't Code § 66410 *et seq.*). These are discretionary approvals, entrusted to elected officials or their nominees, and in Escondido, to the same City Council members who sit on Escondido's Mobilehome Park Rental Review Board. The process is slow, uncertain and expensive.

to the City, no middle ground of analysis. If this were the law, most of what this Court has written about takings would have been entirely unnecessary. *Penn Central* could have been decided in a single sentence, for there was no contention there of either a physical occupation or a total deprivation of value.

From Day One of the operation of the Ordinance Petitioners have had a takings claim because the rights that command a premium passed to the incumbent residents. *Azul Pacifico, supra; DeAnza Properties X v. County of Santa Cruz*, 936 F.2d 1084 (9th Cir. 1991) The only question which remains is the amount of compensation to which they are entitled. The *raison d'être* of rent control is to keep rents below market levels. The Ordinance itself rolls back rents two and a half years and contains an elaborate, time consuming rent reduction oriented process. On its face the Ordinance permits a decision to be rendered in 210 days — in the *Yee* case the application was submitted on June 2, 1989, and a decision was not rendered until December 6, 1990, approximately 550 days later.[17]

Under the *Penn Central* test,[18] given that tenants can determine the identity of the incoming tenant, set the rental rate

[17]*Yee v. Mobilehome Park Rental Review Board, supra* n.2, Administrative Record at 2, 424.

[18]Contrary to the City's assertions, Petitioners argued *Penn Central* below. Brief for Appellants before California Court of Appeal at 14; Petition for Review to California Supreme Court at 21. Even if they had not preserved the issue — which is an alternative legal theory in support of the basic taking claim, not a separate claim for relief — so long as an argument is "so connected with [the question presented] in substance as to form but another ground or reason for alleging the invalidity of the lower court's judgment . . ." it can be considered. *Illinois v. Gates*, 462 U.S. 213, 220 (1983) (quoting *Dewey v. Des Moines*, 173 U.S. 193, 197-198 (1899)). This Court's rules permit consideration of subsidiary questions. "The statement of any question presented [in the Petition for Certiorari] will be deemed to comprise every subsidiary question fairly included therein." Sup. Ct. R. 14.1(a).

for occupancy, and sell that right from the onset of the Ordinance, the Ordinance interferes with Petitioners' use, possession and disposition for the reasons set forth in the Petitioners' opening brief. Equally, the tenants can capture appreciated value from and after January 1, 1986, thus confirming the existence of a massive economic impact, and interference with investment-backed expectations. The only remaining question is the amount by which damages are offset by the minimal rent increases allowed by Escondido.

III. THE ORDINANCE DOES NOT SUBSTANTIALLY ADVANCE A LEGITIMATE GOVERNMENTAL PURPOSE

The "premium" received by the tenant disables the Ordinance from substantially advancing a legitimate governmental purpose in that it in fact permits departing tenants to effectively impose rent increases at market levels and does not serve the purpose of preserving low and moderate housing opportunities, nor does it satisfy the requirement that it closely fit the purpose of protecting the tenant's questionable investment.

CONCLUSION

For these reasons, the judgment of the California Court of Appeal should be reversed with instructions to remand these consolidated cases for trial.

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